



KAPLAN KIRSCH ROCKWELL

224/29

December 8, 2008

Via E-Filing

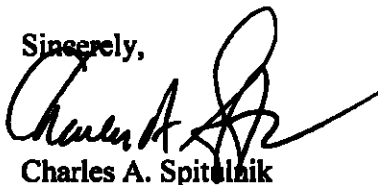
Honorable Anne Quinlan
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: Petition for Declaratory Order
Finance Docket No. 35157

Dear Ms. Quinlan:

I am attaching a Motion for Protective Order filed by the City of Alexandria, Virginia in the above-referenced proceeding.

Sincerely,



Charles A. Spitznik

Attachment

203810

Attorneys at Law
Denver • New York • Washington, DC

Kaplan Kirsch & Rockwell LLP tel (202) 955-5600
1001 Connecticut Ave., N.W. Suite 800 fax (202) 955-5616
Washington, DC 20036 www.kaplankirsch.com

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO 35157

THE CITY OF ALEXANDRIA, VA – PETITION FOR DECLARATORY ORDER

Dated: December 8, 2008

MOTION FOR PROTECTIVE ORDER

The City of Alexandria, VA (“the City”) hereby moves for a protective order pursuant to 49 C.F.R. § 1104.14(b), in order to allow the City to submit to the Surface Transportation Board (the “Board”) under seal its Reply to the Board’s November 6, 2008 Decision in STB Finance Docket No. 35157. The Confidential Version of the City’s Reply is submitted under separate cover marked “Confidential – Filed Under Seal Subject to a Request for a Protective Order” pursuant to 49 C.F.R. § 1104.14(a). A Public Version is also submitted today.

The City makes this motion because its Reply contains excerpts of deposition testimony and documents obtained by the City in discovery in ongoing litigation before the Eastern District of Virginia with Norfolk Southern Railway Co. (“NSRC”) and RSI Leasing, Inc. (“RSI”) *Norfolk Southern Ry Co v City of Alexandria, et al*, Case No. 1:08-CV-618 (E.D. Va.). Some of the deposition testimony contains confidential proprietary information relating to the commercial terms of NSRC’s relationship with RSI and details regarding the ethanol transloading business at NSRC’s Van Dorn Yard. If made public, such information has the potential to be competitively damaging to NSRC.

The City requests that the Board issue a protective order in the form that is attached to this Motion as Appendix A. The proposed form relies upon and is substantially the same as the September 9, 2008 Stipulated Protective Order between the parties in the ongoing district court

litigation. A copy of the Protective Order from the District Court is attached as Appendix B.

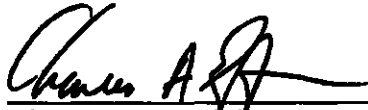
The parties have agreed that information disclosed in the course of discovery in that proceeding may be used in the instant proceedings before the Board, so long as the information is relevant to the inquiries posed in the November 6 Decision in this proceeding

While the proposed Protective Order follows the standard form for such orders, the City notes that the parties agreed to modify the Board's standard provisions related to disclosure of and access to information and documents designated or stamped as "HIGHLY CONFIDENTIAL." First, while the disclosure of such information is generally limited to outside parties and consultants subject to their signing a confidentiality undertaking, in this instance, the parties agreed that such information may be disclosed to certain City personnel in addition to outside counsel and consultants: the City Attorney, the Assistant City Attorney, Rich Baier, Tom Culpepper and Joan Wagner. These individuals are subject to the same requirement of signing a confidentiality undertaking.

Second, the parties established a procedure whereby any party with a need to access "HIGHLY CONFIDENTIAL" information or documents may notify the opposing party to identify the information and to whom it is to be disclosed. The opposing party has 24 hours to either consent or object to the additional disclosure. In the event the opposing party objects to the disclosure, such documents must not be disclosed until the objection is resolved either by agreement of the parties or by the Court.

For the reasons stated above, the City respectfully requests that the Board issue a protective order in the form that is attached to this Motion and allow the City's Reply to be filed under seal.

Respectfully submitted,



Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
Kaplan Kirsch & Rockwell, LLP
1001 Connecticut Ave., N.W.
Suite 800
Washington, DC 20036
(202) 955-5600

Ignacio B. Pessoa
Christopher P. Spera
Office of the City Attorney
300 King Street, Suite 1300
Alexandria, VA 22314
(703) 838-4433

Attorneys for the
City of Alexandria, VA

203535

APPENDIX A

APPENDIX A

PROTECTIVE ORDER

1. For purposes of this Protective Order.

(a) "Confidential Documents" means documents and other tangible materials *containing or reflecting Confidential Information*.

(b) "Confidential Information" means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts, confidential financial and cost data, and other confidential or proprietary business or personal information

(c) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.

(d) "Proceedings" means those before the Surface Transportation Board ("the Board") concerning any directly related proceedings covered by STB Docket No. 35157, and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.

(e) "STB" means the U.S. Surface Transportation Board.

2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and

Confidential Documents as "CONFIDENTIAL." Any information or documents so designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter.

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or a pleading or other paper to be submitted, filed or served in these Proceedings contains shipper-specific rate or cost data, trackage rights compensation levels or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped "HIGHLY CONFIDENTIAL" shall be handled as provided hereinafter.

4. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order

5. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to outside counsel, the City Attorney, the Assistant City Attorney, Rich Baier, Tom Culpepper, Joan Wagner and/or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this order.

6. In the event that a party determines that additional individuals need access to "Highly Confidential" documents, the party must notify the opposing party (1) identifying the individual or individuals to whom the party would like to disclose "Highly Confidential" documents, and (2) identifying the "Highly Confidential" documents to be disclosed, after which the opposing party has 24 hours to either consent or object to the additional disclosure. If the opposing party objects to the additional disclosure, the "Highly Confidential" documents will not be disclosed until the objection is resolved either by agreement of the parties or by the Court.

7. Any party to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the STB to adjudicate such challenges.

8. Designated Material must be kept either in the office of outside counsel or in the office of the City Attorney, may not be copied and may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in the Proceedings, any related proceedings before the District Court, and/or any judicial review proceedings in connection with the Proceedings and/or with any related proceedings.

9. Any party who receives Designated Material in discovery shall return or destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the STB and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the STB unless the pleading or other document is submitted under seal pursuant to the rules of this Board.

11. No party may present or otherwise use any Designated Material at a hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the STB to whom relevant authority has been lawfully delegated by the STB, and has accompanied such submission with a written request that the STB (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

12. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 9 of this Protective Order.

13. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2 or 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.

14. All parties must comply with all of the provisions of this Protective Order unless the STB determines that good cause has been shown warranting suspension of any of the provisions herein.

15. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party

EXHIBIT A

UNDERTAKING

CONFIDENTIAL INFORMATION

I, _____, have read the Protective Order served on _____, governing the production and use of Confidential Information and Confidential Documents in STB Docket No. 35157, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. 35157, before the Surface Transportation Board ("Board"), and/or any judicial review proceedings in connection with STB Docket No. 35157. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that the Parties or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking, but shall be in addition to all remedies available at law or equity.

Signed: _____

Position: _____

Affiliation: _____

Date: _____

EXHIBIT B

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] [other] for [Party to Proceeding], for whom I am acting in this Proceeding. I have read the Protective Order served on _____, governing the production and use of Highly Confidential Information and Highly Confidential Documents in STB Docket No. 35157, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Highly Confidential Information or Highly Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. 35157 before the Surface Transportation Board ("Board"), or any judicial review proceedings in connection with STB Docket No. 35157. I further agree not to disclose any Highly Confidential Information, Highly Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential Undertakings in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners. At the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I agree to promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that the Parties or other parties producing Highly Confidential Information or Highly Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking, but shall be in addition to all remedies available at law or equity.

Signed: _____

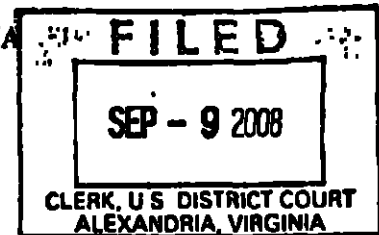
Position: _____

Affiliation: _____

Date: _____

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**



**NORFOLK SOUTHERN RAILWAY
COMPANY,**

Plaintiff,

v.

Case No. 1:08-CV-618

CITY OF ALEXANDRIA, *et al.*,

Defendants.

CITY OF ALEXANDRIA,

Counterclaim Plaintiff,

v.

Case No. 1:08-CV-618

**NORFOLK SOUTHERN RAILWAY
COMPANY,**

Counterclaim Defendant,

and

RSI LEASING, INC.,

Third Party Defendant.

STIPULATED PROTECTIVE ORDER

THIS DAY came the parties, by counsel, and pursuant to the Federal Rules of Civil Procedure and move for entry of an agreed protective order;

AND IT APPEARING to the Court for good cause shown that the order should be entered, it is hereby ORDERED that documents disclosed pursuant to this litigation will be handled as follows:

- 1. For purposes of this Protective Order:**

(a) **"Confidential Documents"** means documents and other tangible materials containing or reflecting Confidential Information.

(b) **"Confidential Information"** means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts, confidential financial and cost data, and other confidential or proprietary business or personal information.

(c) **"Designated Material"** means any documents designated or stamped as **"CONFIDENTIAL"** or **"HIGHLY CONFIDENTIAL"** in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.

(d) **"Proceedings"** means those before the U.S. District Court for the Eastern District of Virginia ("District Court") concerning the complaint, counter-complaint and any other directly related proceedings covered by Docket No. 1:08-CV-618, and any related proceedings before the District Court, and any judicial review proceedings arising from the same or from any related proceedings before the District Court.

2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as **"CONFIDENTIAL."** Any information or documents so designated or stamped as **"CONFIDENTIAL"** shall be handled as provided for hereinafter.

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed or served in these Proceedings contains shipper-specific rate or cost data, trackage rights compensation levels or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped "HIGHLY CONFIDENTIAL" shall be handled as provided hereinafter.

4. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

5. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to outside counsel, the City Attorney, the Assistant City Attorney, Rich Baier, Tom Culpepper, Joan Wagner and/or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this order.

6. In the event that a party determines that additional individuals need access to "Highly Confidential" documents, the party must notify the opposing party (1) identifying the individual or individuals to whom the party would like to disclose "Highly Confidential" documents and (2) identifying the "Highly Confidential" documents to be disclosed, after which the opposing party has 24 hours to either consent or object to the additional disclosure. If the opposing party objects to the additional disclosure, the "Highly Confidential" documents will not be disclosed until the objections is resolved either by agreement of the parties or by the Court.

7. Any party to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the District Court or with a magistrate judge or other officer to whom authority has been lawfully delegated by the District Court to adjudicate such challenges.

8. Designated Material must be kept either in the office of outside counsel or in the office of the City Attorney, may not be copied and may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in the Proceedings, any related proceedings before the District Court, and/or any judicial review proceedings in connection with the Proceedings and/or with any related proceedings.

9. Any party who receives Designated Material in discovery shall return or destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the District Court and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the District Court unless the pleading or other document is submitted under seal pursuant to the rules of this Court.

11. No party may present or otherwise use any Designated Material at a District Court hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the District Court, to a magistrate judge or to another officer to whom relevant authority has been lawfully delegated by the District Court, and has accompanied such submission with a written request that the District Court, the magistrate judge or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

12. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 9 of this Protective Order.

13. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2 or 3 above, such production, disclosure, holding, and use of the materials and of

the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

14. All parties must comply with all of the provisions of this Protective Order unless the District Court or a magistrate judge or other officer exercising authority lawfully delegated by the District Court determines that good cause has been shown warranting suspension of any of the provisions herein.

15. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Entered this 9th day of September, 2008

/s/Thomas Rawles Jones, Jr.

Judge

WE ASK FOR THIS:

Gary A. Bryant
Virginia State Bar No. 27558
Counsel for Norfolk Southern Railway Company
and RSI Leasing, Inc.
WILLCOX & SAVAGE, P.C.
One Commercial Place, Suite 1800
Norfolk, Virginia 23510
(757) 628-5500 Telephone
(757) 628-5566 Facsimile
gbryant@wilsav.com

J. Frederick Sinclair
Virginia State Bar No. 08073
Counsel for Norfolk Southern Railway Company
and RSI Leasing, Inc.
J. FREDERICK SINCLAIR, P.C.
100 N. Pitt Street, Ste. 200
Alexandria, Virginia 22314
(703) 299-0600 Telephone
(703) 299-0603 Facsimile
fred@jfsinclairlaw.com

W. Eric Pilsk, Esquire
Charles A. Spitulnik, Esquire
Counsel for the City of Alexandria
KAPLAN KIRSCH & ROCKWELL, LLP
1001 Connecticut Avenue, N.W., Ste. 905
Washington, DC 20036
Telephone: (202) 955-5600
cpilsk@kaplankirsch.com
cspitulnik@kaplankirsch.com

Christopher P. Spera, Esquire
Ignacio B. Pessoa, Esquire
Counsel for the City of Alexandria
OFFICE OF THE CITY ATTORNEY
301 King Street, Ste. 1300
Alexandria, Virginia 22314
Telephone: (703) 838-4433
Christopher.Spera@AlexandriaVa.Gov